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Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-1204

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

NOAH RYAN ROBINSON,

Petitioner,

vs

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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PETITIONER'S QUESTION PRESENTED FOR REVIEW

I. Whether the racially-motivated strike of a black unmarried female venireperson from the petit jury violated the equal protection principle of Batson v. Kentucky?

RESPONDENT'S QUESTION PRESENTED

I. Whether the state court properly found the reasons for utilizing a peremptory challenge were racially neutral, which were not clearly erroneous under Hernandez v. New York, ___U.S.___ (1991)?

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Respondent State of South Carolina prays that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina entered on September 23, 1991, be denied.

OPINION BELOW

The final judgment of the trial court was not printed in an official reporter. The decision of the Supreme Court of South Carolina is reported as State of South Carolina v. Noah Ryan Robinson, ___S.C.-

___, 409 S.E.2d 404 (1991). The Supreme Court of South Carolina decision was rendered on September 23, 1991. The opinion below is reprinted in the Appendix to the Petition at pages 1a-13a.

JURISDICTION

The judgment of the Supreme Court of South Carolina affirming Petitioner's conviction and sentence was entered on September 23, 1991. Petitioner filed a Motion for Rehearing/Reconsideration which was denied on October 22, 1991. (Order denying Petitioner's Motion for Rehearing/Reconsideration is reprinted in the Appendix to the Petition at page 19a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed ... to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, provides in part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petition for Certiorari comes from the affirmance of a January 28, 1989, conviction of accessory after the fact to a felony and sentence of ten years in Greenville County, South Carolina, for the Petitioner, Noah Ryan Robinson, involving the stabbing of Janice Rosemond. The victim had been a witness to the 1986 shooting death of Leroy "Hambone" Barber.

In June, 1988, the Petitioner, Noah Robinson, was arrested in Greenville County and charged with obstruction of justice, intimidation of a witness, conspiracy, and accessory before and after the fact of a felony based upon allegations that he was involved in the stabbing of Janice Denise Rosemond. The Petitioner was released on bond. In August, 1988, he was indicted on the above charges.

Subsequently, on September 20, 1988, Petitioner was arrested for crimes arising form the murder of Mr. Barber. On October 24, 1988, the state served a Notice of Intention to Seek the Death Penalty. On November 29, 1988, the Petitioner was indicted for murder and criminal conspiracy to commit murder. On December 9, 1988, the trial court granted the Motion for Severance and set bond.

The matter was called for trial on January 16, 1988, before the Honorable

James E. Moore. During jury selection, the state exercised one (1) peremptory strike for a petit juror and one (1) peremptory strike for an alternate. The Petitioner withdrew his Motion to Sever and the case proceeded on all charges.

At trial, the state produced evidence Petitioner solicited the murder of Hambone Barber committed by members of the El Rukns, a Chicago organization. Barber was gunned down outside a bar in Greenville. A witness to the shooting, Janice Denise Rosemond, identified a member of the El Rukns as the killer and testified to this effect before a federal grand jury in Chicago. Soon thereafter, Rosemond was severely stabbed in her home by an acquaintance, Fred Sweeney. Sweeney testified Petitioner wanted him to kill Rosemond because "she spilled on one of his guys." Petitioner offered Sweeney $5,000 to slit Rosemond's throat. Rosemond,

however, survived Sweeney's attack. At Sweeney's request, Petitioner agreed to send him money to flee to Florida. Sweeney received payments of $500 and $200 through Petitioner's associate, Jake Oliver. The jury found Petitioner guilty of accessory to felony after the fact and reached no verdict on all other counts.

The Petitioner appealed to the Supreme Court of South Carolina. One of the issues raised in the appeal concerned whether the Solicitor exercised his peremptory challenges in a racially discriminatory manner. Without finding the existence of a prima facie case of discrimination on the basis of Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court made the following conclusion:

> We find the Solicitor's reasons for striking Juror Shell are racially neutral. Further, the burden is on the defendant to prove that the Solicitor's neutral reasons for his strikes were pretextual because they

were not applied in a neutral manner. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). Here, Appellant raised no issue to the trial judge regarding any alleged pretext and this issue is not preserved on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). In any event, based on the record, we find appellant's claims of pretext to be without support. As to the striking of Juror Leaks, the potential alternate for whom no explanation was given, appellant waived any error in the Solicitor's lack of explanation by failing to raise it below. See State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

(Appendix to the Petition, pp. 4a-5a).

REASONS FOR DENYING THE WRIT

The state court finding that the reason for the peremptory challenge was racially neutral is not clearly erroneous.

In the recent decision of this Court in Herandez v. N.Y., 500 U.S. ___, 111 S.Ct. 1859 (1991), the Court declared that in reviewing a claim for relief under Batson, supra, arising from a state prose-

cution, the Court will decline to overturn a state trial court's finding on the issue of discriminatory intent unless the Court was convinced that its determination was "clearly erroneous." Particularly, this Court declared that it will give such findings deference, particularly on issues involving credibility. 111 S.Ct. 1873.

Respondent submits that certiorari is not warranted here because this record reveals that the Court's finding was not clearly erroneous under the Hernandez test. In this case, individual voir dire was conducted on a panel of thirty-eight (38) prospective jurors and alternates. Of that thirty-eight (38), eleven (11) strikes were exercised by the Court on ten (10) white jurors and one (1) black juror, two (2) strikes were exercised by the state, both jurors stricken were black, and eleven (11) strikes were exercised by

the Petitioner, all jurors stricken by Petitioner being white.

Before jury selection began, the Solicitor suggested a jury selection system that he felt would best facilitate and ease matters should a Batson issue arise. (Tr. p. 46, l. 24 - p. 47, l. 15). The prosecutor repeatedly stated his feeling that a Batson issue would not come up (Tr. p. 46, ll. 24-25; p. 47, ll. 3, 8-9, and 14-15), yet he made every effort to accommodate the Court if such an eventuality were to arise, by suggesting what he felt from experience was the most expedient jury selection system to use, the "panel" system of selection. The Petitioner suggested a different system, but upon the decision by the trial judge to use the "panel" system, Petitioner offered no objection.

The first panel of jurors included four (4) blacks, one (1) of whom was

stricken by the trial judge based upon her expressed opposition to the death penalty in all cases. (Tr. pp. 1641, 446, l. 10 - p. 448, l. 20). The solicitor exercised two (2) peremptory strikes during individual voir dire of the prospective jurors. Both of these jurors stricken by the state were black, potential juror number 162, Phyllis A. Shell (Tr. pp. 1641, 285-295), and prospective alternate juror number 97, John H. Leaks (Tr. pp. 1641; 440-446, l. 9). The fourth black on the first panel of jurors, juror number 65, Vicky Lane Fritz-Hamilton (Tr. p. 1641), was accepted by the solicitor. The final jury consisted of eleven (11) white members, one (1) black member, and two (2) white alternates.

A so-called Batson hearing was held because the solicitor used one of his five peremptory challenges to strike a black juror when the defendant was black. Under

South Carolina procedure established after Batson, there is no requirement for a prima facie showing of discrimination before a Batson hearing is convened. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987).

The solicitor had used a peremptory strike against juror 162, Phyllis Shell. Although the trial judge declared that he was not convinced Petitioner had made a prima facie showing of discrimination under Batson, he did require the state to give its reasons for the striking of one juror. (Tr. p. 506, ll. 16-22). The solicitor then offered the following racially neutral reasons for striking juror 162, Miss Shell:

> I struck the first juror because of general instability and factors surrounding her life that showed a general instability, including a very erratic work history. I believe she had been on her present job four months and she had been on three different jobs for the three years

up to this point in time. She had a two-year-old child out of wedlock. She was not married, she was living at home. She said at one point in time she had never seen anything on TV about the case. I would submit that the defense, then a white juror said that, found that very incredible. When she was confronted again, she admitted that she had seen things on TV about the case. When I went further with her, she admitted that she had seen Reverend Fleming on TV about the case .... [H]e's been the most outspoken person in the community concerning this being a racial prosecution .... You've got the exhibits of the press releases issued by Mr. Robinson. On the top of his press releases, they all say, 'For further information call Reverent Fleming.' I would submit in addition to that, the defense asked her absolutely no questions that would lead the state to believe that they got something, know something about her that would make any prosecutor, I think, suspect as to why they would ask absolutely no questions of a juror. There were no whites that had as an erratic work history, there was no white who had a two-year-old child out of wedlock, or any children out of wedlock. There was, as far as I know, no white who was living at home. There was no white that had the general instability of this juror.

(Tr. p. 507, l. 1 - p. 508, l. 2; p. 508, ll. 5-9).

The solicitor provided in a clear, reasonable and neutral manner, a wealth of legitimate non-racial reasons for the striking of juror 162, Shell. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). If, however, the trial court does hold such a hearing as advised in State v. Jones, 358 S.E.2d at 703, "under Batson, the trial court must examine all relevant circumstances in determining whether a defendant has shown a prima facie case of purposeful discrimination in the state's exercise of its peremptory strikes" and that determining "whether such a showing has been made" is up to the discretion of the trial judge. State v. Smith, 293 S.C. 22, 358 S.E.2d at 390 (1987). Those racially neutral reasons must be clear and reasonably specific legitimate, but they "do not have to rise to the level of

justifying an exercise of a challenge for cause." State v. Tomlin, 384 S.E.2d 707, 709 (1989). The solicitor stated that he chose to strike juror 162, Shell, because of a general instability in her life, including a "very erratic work history." (Tr. p. 507, ll. 1-3). In State v. Martinez, 294 S.E. 72, 362 S.E.2d 641 (1987), chronic unemployment has been accepted as a racially neutral reason for striking black potential jurors. It follows that an "erratic work history" would also fall into a racially neutral category under the same reasoning.

In his Petition, Petitioner complains that the State Supreme Court's conclusion that "appellant raised no issue to the trial judge regarding any alleged pretext and this issue is not preserved for an appeal," citing State v. Bailey, supra, was incorrect. (Petition, p. 8, n. 3). It is clear that the court is instructing

that Robinson's analysis for the first time on appeal of the claimed existence of certain factors on the other jurors did not satisfy any Batson burden where the particular factual arguments comparing certain specific jurors with Ms. Shell had not been made by trial counsel before the trial judge as required before the same argument can be raised in an appeal under State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Caldwell, supra. See Harris v. Reed, 489 U.S. 255 (1989). Since the state court relied upon this specific state procedural bar, certiorari review should be denied.

Nevertheless, the state court rejected the claim under an alternative basis. Petitioner complains the solicitor's use of "general instability" as an explanation is insufficient because he did not strike whites with what Petitioner finds as arguable "instabilities" in their lives. This

argument ignores the fact that no other juror had the sizeable combination of factors found in the life of juror 162, Shell: erratic employment, a child born out of wedlock, unmarried, and still living in her parent's home. (Tr. p. 507, ll. 1-7). Petitioner's arguments are reaching at best when he attempts to compare the above listed reasons for juror 162's general unreliability and dubious worth as a juror to juror number 24, Monica Carol Burwell, a white female whose "instability" was that she "lived out of wedlock with her fiance" (Appellant's Brief, p. 47), juror number 10, Laverne M. Belue, a white female whose "instability" was that she was separated from her husband (Appellant's Brief, p. 47), and juror number 182, Nancy Kay Vaughn, a white female whose "instability" was that she was divorced. (Appellant's Brief, p. 47). Petitioner reached new heights in his

search for a similarity between juror 162's general instability and the life situation of any other juror when by use of mathematics he questioned the legitimacy of a child of a married juror, juror number 21, Jacqueline R. Broyles, and the resulting "instability" this "possibility" raised. (Appellant's Brief, p. 48).

Petitioner argues juror number 13, Vera Bloom, had an apparent "instability" in her life because she stated she would "rather be home" with her husband than sequestered with a jury of strangers during a death penalty case. (Appellant's Brief, p. 48). To suggest that this feeling by the juror is anything less than natural is absurd and Petitioner has chosen to ignore the trial judge's question as to whether her feeling would interfere with her ability to render a fair and impartial verdict and the jury's

response, "no." (Tr. p. 387, ll. 24 and 25; p. 388, ll. 1-3).

In addition to the listed instabilities in the life of Phyllis Shell, juror number 162, the solicitor was concerned with the way her answers about pretrial publicity changed dramatically during questioning about recalling favorable Robinson publicity, a reasonable and legitimate reason for striking a juror. When asked if she had seen anything on TV about the case and if anything stuck out in her mind of what she had seen, the juror replied, "no, I don't really have time to get into it." (Tr. p. 292, ll. 10-17). As questioning continued, juror number 162 admitted to having seen Noah Robinson, the solicitor himself, and Reverend Fleming on television. (Tr. p. 293, ll. 18-25; p. 294, ll. 1-9). In his Petition, Robinson concedes that "Reverend Fleming is a staunch and vocal supporter

of Noah Robinson, who championed Robinson's cause tirelessly." (Petition, p. 14, n. 8). Certainly, a reasonable prosecutor would want to strike a juror who was apparently less than candid about these influences upon questioning.

In the Petition, Petitioner asserts that illegitimacy and single parenthood is a prevalent fact of life in the black community and such would result in a disproportionate exclusion of black persons from service on the jury. The problem with the Petitioner's assertion in a Batson context is not whether the solicitor's reason would disproportionately exclude blacks, but whether the reason evidences a purposeful discriminatory intent to exclude blacks because of their race. As Hernandez stated:

> If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge

> may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

Hernandez, supra, 111 S.Ct. at 1868. The trial judge in this case chose to believe the prosecutor's race-neutral "combination" explanation. As the trial court stated:

> This court is of the opinion that the solicitor has stated a racially neutral reason for exercising peremptory challenge or strike. There was, agreed to by the solicitor, a black juror when he had strikes remaining. There certainly was no pattern.

(Tr. p. 510, ll. 12-20). This finding, based upon the record, in its entirety is not clearly erroneous. Petitioner's arguments have focused entirely on isolated examples of questioning taken out of the context of the entire jury panel subjected to voir dire. As the record demonstrates, there is little or no similarity of background between Phyllis

Shell, juror number 162, and that of the other jurors. Disparate jurors of necessity bring about different lines of questioning. There is nothing inherently prejudicial in pursuing a line of questioning to its logical end. The solicitor gave solid, clearcut, legitimate reasons for his peremptory challenge of juror 162 with no hint of pretext. The trial judge found that Petitioner did not make a prima facie showing of discrimination and absent any showing that his finding was clearly erroneous the determination of the trial judge will not be reversed. Hernandez, supra. Certiorari must be denied.

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,

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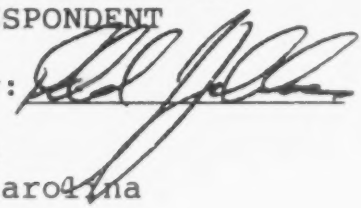
By: 

February 21, 1992
Columbia, South Carolina